82-1451

No.

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CHARLES M. PRESTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the standard of proof in forfeiture actions initiated pursuant to Title 21, U.S.C. § 881(a)(4) should be to require that the government must show probable cause for the belief that a substantial connection exists between the property to be forfeited and the underlying criminal activity.

LIST OF PARTIES IN COURT BELOW

1. United States of America, Plaintiff-Appellee.

2. 1964 Beechcraft Baron Aircraft, TC-740, FAA Reg., No. N444CP, Actual No. N914C, its tools, equipment and appurtenances, Defendant.

3. Charles M. Preston, Appellant.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1982

No.

CHARLES M. PRESTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, CHARLES M. PRESTON, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding November 12, 1982.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, styled United States v. 1964 Beechcraft Baron Aircraft, etc., not yet reported, appears as Appendix A hereto.

JURISDICTION

The judgment of forfeiture entered in this cause was affirmed by the United States Court of Appeals for the Fifth Circuit on November 12, 1982. Petitioner's suggestion for rehearing en banc was denied by the Fifth Circuit by Order dated December 29, 1982 (Appendix C, hereto). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS INVOLVED

Title 21, United States Code § 881(a)

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

> (1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.
>
> (2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing,

delivering, importing, or exporting any controlled substance in violation of this subchapter.

(3) All property which is used, intended for use, as a container for property described in paragraph (1) or (2).

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2), except that:

(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this subchapter or subchapter II of this chapter; and

(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State.

(5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this subchapter.

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

STATEMENT OF THE CASE

In late January, 1978, agents of the Drug Enforcement Administration (DEA) initiated an investigation into an alleged conspiracy to manufacture and distribute methamphetamine between Petitioner, an individual known as Richard Lee Sullivan, and others. This investigation resulted in a nine count indictment charging Petitioner, Sullivan, and a third party with conspiracy to violate the narcotics laws, substantive violations of those laws, and aiding and abetting in the commission of those violations. The indictment as to Petitioner was dismissed in its entirety upon his plea of guilty to a superceding indictment charging misprision of a felony.

In addition to the criminal prosecution, the government initiated civil forfeiture proceedings, pursuant to Title 21, U.S.C. § 881(a)(4), against a 1964 Beechcraft Baron Aircraft, the original defendant in this cause, which was owned by Petitioner at the time of the alleged criminal activity. The evidence introduced by the government at the hearing

in this cause, held on October 19, 1981, reflected merely that the plane was piloted by Petitioner from Abilene, Texas, to Amarillo, Texas, on March 7, 1978, and that on that one occasion it carried Sullivan and a five gallon can of phenyl-2-propanone (P-2-P).[1] None of the law enforcement agents involved in the investigation could testify that Petitioner knew what the five gallon can contained, or even knew that it was on his plane when it left Abilene. The government introduced no other evidence to indicate that Petitioner or his plane were involved in any other way with the alleged conspiracy to manufacture and distribute narcotics, or any other unlawful activity.

On November 10, 1981, the District Court for the Northern District of Texas (Robinson, J.) entered a Judgment of forfeiture against the defendant's plane (App. B, p. 7a). Findings of Fact and Conclusions of Law were also entered by the Court on the same day (App. B, pp. 8a-11a). On November 12, 1982, the United States Court of Appeals for the Fifth Circuit affirmed the Judgment of forfeiture (App. A, pp. 1a-6a). Petitioner's suggestion for rehearing en banc was denied by the Fifth Circuit on December 29, 1982 (App. C, pp. 12a-13a).

[1] Phenyl-2-propanone (P-2-P) is a non-narcotic chemical which can be used to manufacture methamphetamine. At all times pertinent to this cause it was not unlawful to possess P-2-P. On February 11, 1980 P-2-P was added to Schedule II of the Controlled Substances Act.

REASONS FOR GRANTING THE WRIT

I

THE DECISION RENDERED BELOW DIRECTLY CONFLICTS WITH DECISIONS RENDERED BY OTHER UNITED STATES CIRCUIT COURTS OF APPEALS

It is respectfully submitted that the standard of proof applied by the Fifth Circuit in this forfeiture action directly conflicts with the standard of proof being applied by other United States Circuit Courts of Appeals in similar forfeiture actions instituted pursuant to Title 21, U.S.C. § 881(a)(4).

In affirming the judgment of forfeiture, the Fifth Circuit, citing *Vance* v. *United States,* 676 F.2d 183 (5th Cir. 1982) and *United States* v. *One 1979 Mercury Cougar XR-7,* 666 F.2d 228 (5th Cir. 1982), held that the government needed to prove by probable cause only that the defendant airplane was used "in any manner" in the transportation of the P-2-P and that the P-2-P was intended for use in the manufacture of a controlled substance. The probable cause standard applied by the Fifth Circuit was whether there is "a reasonable ground for belief of guilt supported by less than prima facie proof but more than mere suspicion." (App. A, p. 4a citing *United States* v. *One 1979 Mercury Cougar XR-7, supra,* at 230 n.3).

However, at least two other Circuit Courts of Appeals have held the government to a higher burden of proof in forfeiture actions taken pursuant to Title 21, U.S.C. § 881(a)(4). In reversing the forfeiture of an automobile, the Second Circuit, in *United States v. One 1974 Cadillac Eldorado,* 575 F.2d 344 (2nd Cir. 1978) (per curiam), held that the government failed to meet their burden of show-

ing a "sufficient nexus" between the use of the vehicle and the underlying criminal activity.

The First Circuit adopted this same standard in reversing the forfeiture of an automobile in *United States v. One 1974 Chevrolet Corvette*, 625 F.2d 1026 (1st Cir. 1980). In so holding, the First Circuit commented:

> The approach followed by the Second Circuit, focusing on whether there is a "sufficient nexus" between the use of the vehicle and the illegal transaction, is consonant with Congress' statement that "it is the intent of these provisions that property would be forfeited only if there is a substantial connection between the property and underlying criminal activity."

Id. at 1029, quoting from the Psychotropic Substances Act of 1978, Joint Explanatory Statement of Titles I and II, 95th Cong., 2nd Sess., *reprinted in* [1978] U.S. Code Cong. & Admin. News, pp. 9518, 9522.[2]

In addition to the First and Second Circuit Court of Appeals at least one District Court has noted the evolving trend towards imposing a heavier burden on the government in forfeiture actions. Although dictum, the District Court in *United States v. One (1) Liberian Refrigerator*

---

[2]Title 21 U.S.C. § 881 was amended in 1978 to include, among other things, subsection (a)(6), which provides for the forfeiture of currency and other negotiable instruments. Psychotropic Substance Act, Pub. L. No. 95-633, § 301(1), 92 Stat. § 768 (1978). The language quoted by the First Circuit above is taken from the legislative history of that amendment. The First Circuit noted that "[t]he legislative history of 21 U.S.C. *881(a)(4) is silent with respect to the intended scope of the scope of the facilitation clause." United States v. One 1972 Chevrolet Corvette, supra* at 1029, n.4.

Vessel, 447 F. Supp. 1053 (M.D. Fla. 1977) *affirmed*, 617 F.2d 136 (5th Cir. 1980) stated that:

> [C]lose examination of recent federal decisions involving these statutory provisions indicates an evolving trend towards a new principle: a substantial nexus between the contraband or illegal activity and the inanimate facilitating instrumentality (i.e., vessel or vehicle) must be demonstrated. *United States v. One 1972 Datsun*, 378 F. Sup. 1200 (D.N.H. 1978); *United States v. One 1971 Porsche Coupe*, 364 F. Supp. 745 (E.D. Pa. 1973); *United States v. One 1971 Chevrolet Corvette*, 496 F.2d 210 (5th Cir. 1974); *United States v. One 1974 Cadillac Eldorado*, 407 F. Supp. 1115 (S.D.N.Y. 1975) *rev.*, 548 F.2d 421 (2nd Cir. 1977).

It is clear from the cases outlined above that the "use in any manner" standard applied by the Fifth Circuit directly conflicts with the "sufficient nexus/substantial connection" standard employed by the First and Second Circuits. Moreover, the Fifth Amendment mandate that "no person shall be . . . deprived of . . . property without due process of law" and the severe effect of forfeiture statutes on substantial property rights of private individuals heighten the significance of this issue. Review by this Court is therefore both appropriate and necessary to resolve the conflict existing among the Circuit Courts of Appeal and to clarify the standard of proof to be applied in forfeiture actions.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

1964 BEECHCRAFT BARON AIRCRAFT,
TC-740, FAA REG., NO. N444CP,
ACTUAL NO. N914C, its tools, equipment
and appurtenances, Defendant,

Charles M. Preston, Appellant.

No. 81-1569
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Nov. 12, 1982.

Appeal from the United States District Court for the Northern District of Texas.

Before CLARK, Chief Judge, RUBIN and JOHNSON, Circuit Judges.

PER CURIAM:

Charles Preston appeals from the judgment of forfeiture against his 1964 Beechcraft Baron airplane. The district court found that probable cause existed to believe that the aircraft was used to transport a quantity of

phenyl-2-propanone (P2P) for the intended purpose of manufacturing or producing amphetamines or methamphetamines. The aircraft was ordered forfeited pursuant to 21 U.S.C. § 881(a)(4). The appellant alleges that there was insufficient evidence to make a finding of probable cause and that certain investigative reports were entered in violation of Rule 803 of the Federal Rules of Evidence. We disagree and affirm the lower court.

Preston was the owner of a 1964 Beechcraft Baron aircraft. He was also apparently a friend of Richard Lee Sullivan. In January, 1978, Sullivan met with agents of the Drug Enforcement Agency who were investigating the manufacture of amphetamines and methamphetamines. During that meeting, Sullivan asked the agents for P2P, which is used to manufacture amphetamines and methamphetamines. Two weeks later, Sullivan met again with the agents in a bar in Clovis, New Mexico. It is here that Preston first entered the picture as Sullivan's consort. Preston drove Sullivan to this Clovis meeting in his jeep. Though Preston took no part in the negotiations between Sullivan and the agents, he also drove Sullivan back to Amarillo, Texas, after Sullivan had obtained 500 grams of P2P from the agents.

Preston reappeared with Sullivan in March when he flew Sullivan to Abilene in his Beechcraft Baron. There, Sullivan met two undercover agents who delivered to Sullivan a five-gallon can filled with P2P and an electronic device that emitted a signal that could be tracked. The agents testified at trial that they saw Sullivan take the five-gallon container to Preston's airplane. He walked behind the aircraft and then walked away from the plane empty-handed. The two men flew away from the airport shortly thereafter with Preston piloting the aircraft. Two agents

waiting at the Amarillo airport testified that they saw Sullivan, container in hand, and Preston levae the aircraft. craft.

Agents, using the signals from the device planted in the container, then traced it to Customized Services, a business in Amarillo owned by Preston. A later search of that facility failed to recover the container. Preston acknowledged that he destroyed the container and the P2P.

The United States government sought the forfeiture of Preston's aircraft under 21 U.S.C. § 881(a)(4). That section specifies that "all conveyances, including aircraft, vehicles, or vessels which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession or concealment" of all controlled substances or raw materials, products or equipment used or intended for use in the manufacture of any controlled substance may be forfeited to the government. The trial court found that probable cause existed to believe that the aircraft was used for the transportation of raw materials which were intended for use in the manufacture of a controlled substance.

Preston raises two issues on appeal: (1) that the trial court used an improper standard in determining whether probable cause existed and, when the proper standard is used, the evidence is insufficient to support the verdict; and (2) that several DEA reports were admitted into evidence in violation of the hearsay rule.

[1, 2] In bringing this forfeiture action, the government has the burden of establishing that probable cause exists to believe that the vehicle subject to forfeiture was used in the transportation of the raw materials intended

for use in the manufacture of a controlled substance. *Vance v. United States,* 676 F.2d 183, 187 n.7 (5th Cir. 1982). The probable cause standard to be used in actions brought under § 881(a)(4) is whether there is "a reasonable ground for belief of guilt supported by less than prima facie proof but more than mere suspicion." *United States v. One 1979 Mercury Cougar XR–7,* 666 F.2d 228, 230 n.3 (5th Cir. 1982). A § 881 forfeiture is proper if the vehicle in question was used "in any manner" to facilitate the sale or transportation of a controlled substance or raw material used in the manufacture of a controlled substance. *Id.* at 230.

Preston urges this court to adopt a stricter forfeiture standard – that there must be a "substantial connection" between the vehicle to be forfeited and the criminal activity. For this proposition, he cites *United States v. $364,960.00 in United States Currency,* 661 F.2d 319 (5th Cir. 1981), which interprets § 881(a)(6), a complementary provision to the one at issue here. Section 881(a)(6), which authorizes the government to bring forfeiture actions against money or other things of value negotiated in exchange for drugs, was added in 1978. Psychotropic Substances Act, Pub.L. No. 95-633, § 301(1), 92 Stat. 3768 (1978). That amendment's legislative history uses the "substantial connection" language which the court correctly relied upon in *United States v. $364,960.00 in United States Currency.* However, that amendment's legislative history makes no mention of using the same test for other forfeiture actions and the legislative history of § 881 is devoid of any mention of a "substantial connection" test. H.Rep.No. 1444, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Ad. News 4566. Preston argues that both the money seized in $364,960 and the airplane in this case are "derivative contraband" and therefore should be

treated similarly. But Preston can offer no persuasive proof that Congress intended to change the test to be used in the body of the forfeiture statute when it added Section 881(a)(6). Such an interpretation would be contrary to *1979 Mercury Cougar, supra,* which allows forfeiture of vehicles which are used "in any manner" in the transportation or facilitation of transportation of controlled substances or their raw materials. That decision suggests a far more liberal standard than the one urged here by Preston. The "substantial connection" standard does not apply to § 881(a)(4)

[3] Given that "use in any manner" to facilitate the sale or transportation of a controlled substance raw material is the proper test, it is clear that the government established at trial that probable cause existed to forfeit the airplane. The trial testimony and exhibits confirm that undercover agents gave a five-gallon container reportedly containing P2P to Sullivan. Sullivan walked to Preston's airplane with the can and then walked away without it. He was later seen with Preston in Amarillo walking from the airplane carrying that same container. The aircraft was used as a means of travelling to the meeting between Sullivan and the agents. At that meeting, Sullivan obtained the P2P necessary to manufacture the controlled substance. It was Preston's aircraft that allowed Sullivan to make his appointment and it was Preston's aircraft that carried the man and container back to Amarillo. Contrary to Preston's assertions, it is immaterial that the plane was never flown to Albuquerque (where the laboratory was located) or that amphetamines or methamphetamines were never transported in the plane. Viewing the evidence in the light most favorable to the government, we affirm the lower court's finding of probable cause. *Glasser v. United*

States, 315 U.S. 60, 80, 62 S.Ct.457, 469, 86 L.Ed. 680 (1942).

[4] Preston's second contention is that ten exhibits were improperly admitted into evidence by the trial judge. Preston argues that the reports and documents admitted were inadmissible hearsay. Even if the documents do not fall within the hearsay exceptions in Rule 803(8) of the Federal Rules of Evidence, and we believe they do, the government in this case need only prove probable cause. Probable cause may be proved with hearsay evidence. *Bush v. United States,* 389 F.2d 485, 489 (5th Cir. 1968). The documents were properly admitted.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

UNITED STATES OF AMERICA,	)	
	)	
PLAINTIFF,	)	Civil Action
V.	)	No. CA-2-78-150
	)	
1964 BEECHCRAFT BARON AIRCRAFT TC-740 FAA REG. No. N44CP, ACTUAL No. N914C, its tools, equipment and appurterances,	)	U.S. DISTRICT COURT NORTHERN DISTRICT OF TEXAS FILED NOV 10 1981 Joseph McElroy, Jr. Clerk By /s/ _____ Deputy
DEFENDANT.	)	

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JUDGMENT

This action having been tried before the Court, and the Court having entered its Findings of Fact and Conclusions of Law,

It is ORDERED, ADJUDGED, and DECREED that the defendant 1964 Beechcraft Baron Aircraft TC-740 FAA Reg. No. N44CP, Actual No. N914C is forfeited to the Plaintiff United States of America. All costs shall be taxed against the claimant, Charles Preston.

ENTERED this 10th day of November, 1981.

/s/ MARY LOU ROBINSON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

UNITED STATES OF AMERICA,	)	
	)	
PLAINTIFF,	)	Civil Action
V.	)	No. CA-2-78-150
	)	
1964 BEECHCRAFT BARON	)	
AIRCRAFT TC-740 FAA REG.	)	U.S. DISTRICT COURT
No. N44CP, ACTUAL No. N914C,	)	NORTHERN DISTRICT OF TEXAS
its tools, equipment and	)	FILED
appurterances,	)	NOV 10 1981
	)	Joseph McElroy, Jr.
DEFENDANT.	)	Clerk
		By /s/ _____
		Deputy

FINDINGS OF FACT AND CONCLUSION OF LAW

This action came on for trial before the Court without a jury on October 19, 1981. After having considered the evidence, the pleadings, and the trial briefs and arguments of counsel, the Court does hereby enter the following Findings of Fact and Conclusions of Law.

Findings of Fact

1. This is a forfeiture action brought by the United States against one 1964 Beechcraft Baron Aircraft, TC-740, FFA Reg. No. N44CP, Actual No. N914C.

2. The claimant in this action is Charles Preston. At all times relevant to this cause of action Preston was the owner of the defendant aircraft.

3. On March 7, 1978, at the request of Richard Lee Sullivan, Charles Preston flew the defendant aircraft from Amarillo, Texas, to Abilene, Texas.

4. At the airport in Abilene, Texas, Richard Sullivan met with two undercover Drug Enforcement Administration agents for the purpose of obtaining a quantity of phenyl-2-propanone. Sullivan wanted the phenyl-2-propanone for the purpose of processing amphetamines and methamphetamines.

5. Prior to the meeting at the airport in Abilene, Texas, the Drug Enforcement agents had ordered 12 bottles of phenyl-2-propanone from Delmon Craft Company in Houston, Texas. Twelve bottles represented to be phenyl-2-propanone were delivered to the Drug Enforcement agents from the Delmon Craft Company. The substance inside the 12 bottles had the appearance and smell of phenyl-2-propanone.

6. Prior to the meeting at the airport in Abilene, Texas, the Drug Enforcement agents transferred the phenyl-2-propanone to a five-gallon can fitted with a beeper transmitter.

7. At the airport Sullivan took the five-gallon can that contained phenyl-2-propanone and placed it aboard the defendant aircraft.

8. Charles Preston and Richard Sullivan then flew from Abilene, Texas, back to Amarillo, Texas, with the five-gallon can aboard the aircraft.

9. Upon arrival at the Amarillo, Texas, airport Charles Preston and Richard Sullivan removed the five-gallon can containing phenyl-2-propanone from the defendant aircraft and place it inside an automobile owned by

Preston. The five-gallon can was taken to Customized Services, a business owned by Preston.

10. On or about March 7, 1978, Charles Preston destroyed the can containing the phenyl-2-propanone in order to conceal the actual commission by Richard Sullivan and others of the offense of conspiracy to manufacture and distribute a controlled substance. Preston was arrested on March 10, 1978. Preston subsequently pled guilty to the misprison of a felony.

11. Charles Preston was at all times relevant to this cause of action aware of the use to which Richard Sullivan intended to place the phenyl-2-propanone.

12. Phenyl-2-propanone is an immediate precursor of amphetamines and methamphetamines.

13. Probable cause exists to believe that the defendant aircraft was used to facilitate the transportation of phenyl-2-propanone for the use in manufacturing amphetamines and methamphetamines.

Conclusions of Law

1. The Court has jurisdiction of this action pursuant to 18 U.S.C. § 812 and U.S.C. §§ 881 and 841.

2. Problable cause exists to believe that the defendant aircraft was used for the intended purpose of transporting a quantity of phenyl-2-propanone for the intended purpose of producing or manufacturing amphetamines and methamphetamines.

3. The claimant has not established by a preponderance of the evidence that the defendant aircraft is absolved from culpability or that the forfeiture is not properly within the forfeiture statute.

4. The defendant aircraft is forfeited to the United States under 21 U.S.C. § 881.

5. Any finding of fact herein which is a conclusion of law shall be deemed a conclusion of law and any conclusion of law herein which is a finding of fact shall be deemed a finding of fact.

ENTERED this 10th day of November, 1981.

/s/ MARY LOU ROBINSON
United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-1569

U.S. COURT OF APPEALS
FILED
DEC 29 1982
Gilbert F. Ganucheau
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

1964 BEECHCRAFT BARON AIRCRAFT, TC-740, FAA REG., NO. N444CP, ACTUAL NO. N914C, its tools, equipment and appurtenances,

Defendant,

CHARLES M. PRESTON,

Appellant.

Appeal from the United States District Court
for the Northern District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 11/12/82, 5 Cir., 1982, ____ F.2d ____)

(December 29, 1982)

Before CLARK, Chief Judge, RUBIN and JOHNSON, Circuit Judges.

PER CURIAM:

Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor judge in regular active service of this court having requested that the court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the suggestion for rehearing en banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

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